No. 86-1214

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FREDERICK W.A. KNIGHT,

Petitioner,

– against –

U.S. FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, ROYAL INSURANCE COMPANY OF AMERICA, NORTHWESTERN NATIONAL INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, and CONTINENTAL INSURANCE COMPANY,

Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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February 25, 1987

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ARGUMENT

I.

RULE 17 CONSIDERATIONS WARRANT REVIEW BY THIS COURT

Defendants assert there is "no special or important reason for granting of a writ in this case under Rule 17 of this Court's Rules." (Brief in Opposition, p. 1). However, several considerations embodied in Rule 17 warrant grant of a writ.

First, in the short time since it was decided in October 1986, this case has quickly become the leading case on summary judgment under Rule 56, F.R. Civ. P. To date, it has been cited in 24 reported cases in the brief period since its determination. We have had inquiries from numerous parties in other actions and no doubt it has been

relied upon in countless others. Indeed, Knight v. U.S. Fire, et al., 804 F.2d 9 (2nd Cir. 1986) is likely to become to "summary judgment" what International Shoe Co. v. Washington, 326 U.S. 310 (1945) is to "minimum contacts". It deserves the attention of this Court.

Second, the Second Circuit has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the district court as to call for this Court's supervision under Rule 17. The record of the proceeding herein discloses that the lower court scrutinized only the conduct of the assured, expressly reserving decision on the assured's claims of bad faith by the insurers until after decision on uberrimae fidei of the assured. This violated the substantive law which requires

"good faith" to be a two-way street, Puritan Ins. Co. v. Eagle S.S Co. S.A., 779 F.2d 866 (2nd Cir. 1985) and ignored the burden of proof, which is on the insurers. Contractors Realty Company, Inc. v. Insurance Company of North America, 469 F. Supp. 1287 (S.D.N.Y. 1979). In this connection, we take issue with defendants' argument that we urge the doctrine of uberrimae fidei to be abrogated or nullified (Brief in Opposition, pp. 1, 10). On the contrary, we seek review of a situation where the doctrine was applied to only one party and used as a tool by the other to defeat a prima facie case.

Moreover, the lower court violated the mandate of Rule 56, F.R. Civ. P. requiring that presumptions and references be drawn in favor of the non-moving party by ignoring the undisputed and conceded fact

that the insurers knowingly and intentionally omitted the prior cancellation as a ground for cancelling the policy, when they had full knowledge of it, and sua sponte finding fraud as to the sole basis for the decision when fraud had been neither pleaded nor proved.

Third, the court of appeals departed widely from the accepted and usual course of proceedings on review of summary judgment by writing new law, without legal precedent, on uberrimae fidei and ignoring two critical issues expressly raised on appeal: 1) waiver by the insurers and 2) the clearly erroneous and prejudicial finding of fraud by the lower court. Indeed, in connection with waiver, the court of appeals' decision (and lower court's) are in direct conflict with the Second Circuit's recent decision that an insurer cannot cancel a policy

on one ground and later cancel on another ground if that latter ground was known to the insurers at the time of cancellation and was not given as a ground for the cancellation. Luria Bros. & Co. v. Alliance Assur. Co., Ltd., 780 F.2d 1082 (2nd Cir. 1986). As stated by the lower court in denying reargument in this case:

> "The Luria court held that where an insurer originally refused to pay based on a specific defense, unless the insurer had no knowledge of the facts giving rise to a new and additional defense, he is bound by the original defense and all other grounds for avoiding liability are waived." (A-45)

Significantly, neither the issue of waiver nor fraud was addressed by defendants in opposition to the petition for a writ of certiorari.

II.

DEFENDANTS' COUNTERSTATEMENT OF THE FACTS IS REPLETE WITH DISPUTED FACTS AND IRRELEVANT AND PREJUDICIAL MATERIALS

Defendants devote most of their brief to a "Counterstatement of the Case," which they erroneously state contains facts which are "undisputed." (Brief in Opposition, p. 2) This is not the case - many of the alleged facts are in dispute.

Moreover, almost all of defendants' "facts" relate to issues which the lower court held involve genuine questions of material fact. These "facts" include the relatively low purchase price of the collection which the lower court found was "a fact of not much consequence to the subsequent insurers," (A-33), the removal of the collection from Thailand, in connection which the court

found "there is little indication even in their own depositions that prior violations of Thai export regulations would affect the risk of such a voyage [Singapore to Greece]" (A-34), and communications between Mr. Knight and his insurers regarding the sale and preparations for the transportation to Greece which the court found "involve similarly crucial and factually unresolved questions of materiality." (A-35).

Finally, defendants make highly prejudicial statements in connection with the sinking of the ALIAKMON RUNNER, which is the subject of litigation in Germany and was not part of this case. Indeed, defendants have admitted that after extensive investigation they know of no connection between Mr. Knight and the loss of vessel. Defendants' use of these statements and irrelevant "facts" in

their brief should be disregarded by the court.

Furthermore, defendants omit numerous facts of record which indicate bad faith, not good faith, on the part of the insurers. For example, defendants state there were sixty-six depositions (Brief in Opposition, p. 2) but fail to mention that plaintiff was denied access to materials obtained by the insurers their investigation due to unsubstantiated death threats. Based on counsel's unsubstantiated assertions, which were later withdrawn, the court permitted the insurers to withold information from the assured, without an in camera review.

Secondly, defendants state at p. 4 that "upon receiving the Lau report, London underwriters voided the policy ab initio ..." This is a gross misstatement and physical

impossibility as the Lau report was not received until well over a week after the notice of cancellation was given.

Third, defendants fail to mention that prior insurers' own agent in Singapore admitted to Mr. Knight that they "did not know the basis" upon which the cancellation was made "as we had been advised that only one piece seen by Mr. Lau was a fake."

These and other genuine issues of fact, all relating to materiality of the prior cancellation, entitle Mr. Knight to have his day in court.

III.

DEFENDANTS HAVE MISLED THIS COURT BY THEIR ARGUMENT BASED ON KING V. AETNA INSURANCE CO., 54 F.2d 253 (2d Cir. 1931), WHICH HAS BEEN DISTINGUISHED IN CIRCUMSTANCES SIMILAR TO THIS CASE

Defendants erroneously argue that the court of appeals applied the proper standard in granting summary judgment by referring to King v. Aetna Insurance Co., 54 F.2d 253 (2d Cir. 1931), the sole case relied upon by the district court. However, King has been distinguished in Rosenthal v. Poland, 337 F.Supp. 1161 (S.D.N.Y. 1972) on facts similar to those in this case. In King the court noted that there was no independent evidence of increased value over purchase price, stating:

> "The purchase price is of course not conclusive of the value, but certainly justifies an inference [of value], in the absence of anything to the contrary...." (Emphasis supplied). King at 254.

In Rosenthal the court addressed facts similar to those in King, but with a significant difference. The insured had purchased an old ferryboat for $2,850, the "Ferryboat Orange," and obtained insurance on it for $100,000. Following loss of the ferryboat, the insurers refused to honor the policy, alleging over-valuation and relying on the decision in King. The Rosenthal court discussed the King holding in depth and refused to follow it, stating that King was "readily distinguishable and not dispositive" because of "important factual differences" between the cases. Rosenthal at 1169.

The Rosenthal court specifically distinguished the King case on the ground that in King there was nothing to support the increased value over the original purchase price. In contrast, the court in the

"Ferryboat Orange" case had "substantial evidence that the true value of the [ferryboat] far exceeded the price paid by plaintiff..." Id at 1169.

In this case there was also substantial evidence that the collection was worth its insured value, a value far exceeding the original "very moderate prices." Mr. Veera, a well respected expert in Thai and Khmer artwork, had issued a Valuation Report appraising the collection at $30,307,500. This value had been corroborated by the deposition testimony presented to the court of two other experts in Thai and Khmer art, Mr. Sanong and Mr. Samporn, who had both made first-hand examinations of the entire collection.

This independent evidence of increased value over original purchase price

makes the reliance on King by the lower court and the defendants wholly misplaced. There is no legal basis for the court's decision and defendant's references to the dicta in King are misleading in light of the Rosenthal holding.

Plaintiff's independent evidence of record on value, together with the expert testimony, depositions of the assured and broker on materiality and insurers' admissions in the cancellation letters themselves, clearly present a sufficient disagreement to require submission to a jury, precluding a directed verdict under Federal Rule of Civil Procedure 50(a) and summary judgment under Rule 56.

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of certiorari, plaintiff respectfully submits that its petition should be granted.

Respectfully submitted,

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